IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 22ND NOVEMBER 2007 / 1ST AGRAHAYANA 1929

SA.No. 533 of 1994()

AS.1/1989 of DISTRICT COURT, KOTTAYAM
OS.197/1984 of PRL.SUB COURT,KOTTAYAM
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APPELLANT: APPELLANT/ DEFENDANT

KOTTICKAL PANCHAYAT, REP.BY
EXECUTIVE OFFICER, KOOTTICKAL
PANCHAYAT, KOOTTICKAL PO., MUNDAKKAYAM.

BY ADV. SRI.K.SURENDRA MOHAN

RESPONDENT/ RESPONDENT/ PLAINTIFF

P.C.MATHEW, S/O. CHACKO, CONTRACTOR,
RESIDING AT PULIKKUNNEL,
KAIPPALLY P.O., POONJAR SOUTH,
MEENACHIL. (DIED)

ADDL. R2 TO R8 ARE IMPLEADED.

2. THRESSIAMMA MATHEW,
W/O. LATE MATHEW, PULIKKAKUNNEL,
KAIPPALLY P.O., POONJAR SOUTH,
MEENACHIL, KOTTAYAM DT.

3. BABY P. MATHEW, S/O. LATE MATHEW
DO. DO.

4. BR. THOMAS MATHEW, S/O. LATE MATHEW
DO. DO. DO.

5. SRI.RANI MATHEW , D/O. LATE MATHEW,
DO. DO.

ADDL. RESPONDENTS R2 TO R5 AND IMPLEADED AS LR'S OF DECEASED SOLE RESPONDENT AS PER ORDER DT. 6.8.07 ON IA. 472/03.

BY ADV. SRI.V.R.KESAVA KAIMAL - R2 TO R5
SRI.N.M.MADHU

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 22/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

S.A . NO.533/1994

ORDER ON CMP. NO.1083/1994 IN SA. NO.533/1994

DISMISSED

22.11.2007 **SD/- M.SASIDHARAN NAMBIAR,JUDGE**

/TRUE COPY/

P.S. TO JUDGE

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M.SASIDHARAN NAMBIAR,J.

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S.A. NO.533 OF 1994

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Dated this the 22nd day of November, 2007

JUDGMENT

The defendant Panchayat in O.S.197/1984 on the file of Sub Court, Kottayam is the appellant. Plaintiff is the respondent. Respondent admittedly undertook the work of construction and improvement of Chathanplappally Government L.P. School road which was one of the items of work under Seven Point Programme. The work was supervised by Kerala Public Works Department. Ext.B1 tender was submitted by the respondent for the said work. It was accepted by appellant Panchayat. Ext.B2 agreement was admittedly executed by respondent and appellant. Ext.B2 agreement shows the details of the estimate of work undertaken by respondent. It includes earth work excavation on all class of soil except hard rock blasting of hard rock measured in solid conveying blasted rock dry rubble masonry for retaining wall and damping of blastered rubble in

gulleys and bed of stream. The total estimate was Rs.94,000/-. The work was to be carried out by respondent for Rs.91,615/-. While the work was in progress, respondent was directed by the Engineer to blast additional quantity of solid rock which was found necessary for completing the formation of the road. Respondent after carrying out the work claimed payment for the said work. Rs.21,947/- is the amount so demanded. It was refused by the Panchayat on the ground that, the said work was not sanctioned by the Panchayat. Respondent instituted the suit for realisation of the said amount. Appellant resisted the suit on the ground that additional work was not sanctioned by the Panchayat and though the original estimate was to construct a road at a distance of 900 metres for the estimated amount of Rs.94,000/-, distance was reduced to 750 metres to carry out the work for an amount not exceeding Rs.94,000/- and no additional work was sanctioned by the Panchayat and Executive Engineer is not competent to carry out any work

without sanction and the final bill prepared by respondent was not correct and not binding on the Panchayat and respondent colluded with the officials of the Public Works Department and submitted an exaggerated bill and Panchayat is not liable to pay the same and therefore the suit is not maintainable. It was also contended that final amount was received by respondent in full and final satisfaction of the amount due under the agreement and therefore respondent is not entitled to claim any additional amount.

2. Learned Sub Judge on the evidence of Pws.1 to 3, DW1 and Exts.A1 to A5, B1 to B5(b) and X1 to X2(c) rejected the case of the appellant that additional work was not carried out by respondent. On the evidence of PW1, the Engineer and Ext.X1 series of records produced from the Public Works Department, it was found that respondent respondent had in fact carry out the additional work of blasting of solid rock. Learned Sub Judge also found that as per Clause 13 of Ext.B2 agreement,

respondent is bound to carry out the work as directed by the Engineer and when the Engineer directed him to carry out the blasting of the solid rock, which was not included in the original estimate, he cannot disobey the same and therefore respondent is entitled to get payment for the work as provided under clause 13 at the rate provided under the contract and respondent is entitled to the amount claimed in the plaint. The case of the appellant that the suit is not maintainable because of Ext.B4 receipt containing a printed endorsement and that the amount is received for the full and final settlement of the claim was rejected by the trial court holding that the waiver could only be intentional and with the knowledge of relinquishing the claim and Ext.B4 does not show that the claim for the additional work carried out by respondent was waived and the correspondence between the parties before and after establish that there was no waiver and granted a decree for realisation of Rs.21,922/- with interest at 6% from 18.4.1984.

Appellant challenged the judgment before District Court, Kottayam in A.S.1/1989. Learned District Judge on reappreciation of evidence found that under Ext.B2 agreement the contractor was bound to carry out the work specified by the Engineer and the extra work sanctioned by the Engineer was carried out by respondent and as provided under Ext.B2 agreement, he is entitled to get payment for that work and upheld the findings of the trial court that respondent is entitled to realise the amount for the additional work. Learned District Judge also confirmed the findings of trial court that Ext.B4 will not operate as a waiver or estoppel and dismissed the appeal. It is challenged in the second appeal.

3. Second appeal was admitted formulating the following substantial questions of law.

1. Whether principle of promissory estoppel is applicable against a statutory authority, in the

face of an express statutory prohibition?

2. Whether Rule 8 of Kerala Panchayats (Plan and Estimates) Rules, 1963 does not prohibit the undertaking of any work without prior administrative and technical sanction from competent authorities?

3. Whether principle of promissory estoppel applies to a contractor, who has executed a receipt in full settlement of all his claims against the Panchayat and whether Ext.B4 amounted to a waiver of his claims.

4. Learned counsel appearing for appellant and

respondent were heard.

5. The argument of learned counsel appearing for appellant is tht Ext.B2 does not enable respondent to carry out any additional work which was not sanctioned by the Panchayat, even if directed by the Engineer and the Panchayat is not liable to pay any amount in excess of the sanctioned work and when the additional work allegedly carried out by respondent was not sanctioned by Panchayat, courts below should not have granted a decree in favour of respondent. It was also aruged that under Ext.B4 respondent has declared that he has received the balance amount towards the full and final settlement of the claim under Ext.B2 agreement and in the light of Ext.B4, courts below should not have gratned a decree in his favour. It was also argued that if engineers are to be permitted to get additional work done without the sanction of the Panchayat and against the mandatory provisions of Kerala Panchayats (Plan and Estimates) Rules 1963, fictitious claims by

the contractor in collusion with the engineers cannot be prevented and in such circumstance, the provisions of Kerala Panchayats (Plan and Estimates) Rules 1963 are to be scrupulously followed and when respondent has no case that additional work was sanctioned by the Panchayat he is not entitled to claim any amount from the Panchayat and therefore the decree granted by the courts below are bad.

6.Learned counsel appearing for respondent argued that under Ext.B2 agreement respondent contractor cannot disobey the directions of the executive engineer who is the competent authority as provided under Ext.B2 and the relevant clause in Ext.B2 mandates that respondent shall execute the work as directed by the competent authority, including additional work, and he can only claim payment for the additional work as provided under the agreement and when it is proved that respondent has carried out the additional work, he is entitled for the amount. Learned counsel also argued that

in Ext.B4 respondent had only acknowledged the receipt of the amount covered thereunder and writings in the printed form showing as final and full settlement of the claim is not binding on the respondent as he did not consciously declared that he is not entitled for payment for the additional work carried out and the appeal is only to be dismissed.

7. Exts.B1 and B2 establish that respondent executed Ext.B2 agreement pursuant to acceptance of Ext.B1 tender. Under Ext.B2 he had undertaken to carry out the work of constructing Chathanplappally Government L.P. School road for the estimated amount of Rs.91,615/-. The abstract of the estimate which forms part of Ext.B2 agreement proves that in addition to the excavation of earth work, the estimate includes 719 cubic metres of blasting of hard rock measured in sold for the purpose of formation of the road. Courts below on the evidence found that while the work was in progress, it was found that total quantity of the

sold rock which was to be blasted for forming the road was not 719 cubic metres as estimated but 1462 cubic metres. It is also found by the courts below on the evidence of PW1, the Engineer and Ext.X1 series of the records, showing the details of the work done that respondent had completed the construction of the work of the road after carrying out the additional work of blasting of the additional quantity of solid rock. The claim of the respondent is for payment of the said additional work. Though appellant contended before the courts below that no additional work was carried out, on the evidence, both the trial court and first appellate court entered a factual finding that the additional work as claimed by respondent and proved by the evidence of PW1 was executed. That factual finding cannot be interfered in the second appeal. The only question is whether respondent is entitled for payment of the additional work and whether the claim is barred by waiver or estoppel in view of Ext.B4 receipt.

8. The crux of the defence raised by the appellant was based on non-sanctioning of the additional work by the Panchayat. The argument is that under Rule 4 of Kerala Panchayats (Plan and Estimates) Rules,1963, (hereinafter referred to as the Rules)a detailed estimate shall be prepared as provided under the Rules and the estimate shall ordinarily consist of each portion of the work to be done and under Rule 11 a revised and supplemental sanction is necessary for carrying out any additional work not included in the estimate originally sanctioned. Rule 11 provides that after an estimate has been once sanctioned, any deviations shall be communicated to the sanctioning authority and its sanction obtained after submission of revised estimate, supplemental estimate and completion report. Under sub rule 2 a revised estimate shall be submitted when the total sanctioned estimate of the cost is likely to be exceeded, in consequence of an increase of rates or increase of quantity or from damage caused by

floods or from the necessity of renewing a work executed directly or by a contractor when it is condemned by any higher authority or for any other cause discovered during the execution work under proper sanction. Under Rule (4) a supplemental estimate shall be prepared when a development of the project or work, which is not fairly contingent on the proper execution of the work as first sanctioned is thought necessary while it is in progress. The argument is that when the quantum of solid rock to be blasted estimated was less and it was found more and additional work was necessary, a revised estimate as provided under Rule 11 should have been prepared and sanction should have been obtained and Panchayat is not liable to pay for the work unless the additional work was sanctioned after submission of a revised estimate as provided under Rule 11 and therefore appellant is not liable to pay the amount to the respondent. True, any additional work if a revised estimate or supplimental estimate is warranted as provided

under Rule 11, then the work could be carried out only after obtaining sanction for the additional work from the Panchayat. But the question in the present case is whether respondent who admittedly executed the work, as directed by the executive engineer the competent authority under Ext.B2 agreement is entitled to get payment for the additional work executed by him.

9. Clause 13 of Ext.B2 provides for the said contingency. It reads:-

> "13. The concerned Authority shall have power to make any alteration in the original designs, drawings or instructions that may appear to him to be necessary during the progress of a work, and the contractor shall be

bound to carry them out within such time as may be specified in writing. The contractor shall be bound to carry out all extra items not provided for in the agreement shcedule but found necessary during execution of work. The extra items will be paid for at schedule rates maintained by Panchayat plus or minus the proportionate difference between the probable amount of contract as per accepted tender and estimate amount

excluding the cost of departmental materials supplied. Such alteration shall not invalidate the contract,but the time for the completion of the work will be extended in the proportion that the extra work bears to the original work and the certificate of the concerned Engineer shall be conclusive as to such proportion but the contractor shall not make any alterations or execute any work not provided in contract without the

aforesaid Engineer's

authority in writing."

Clause 13 mandates that a contractor is bound to execute the work, even if it is an additional work directed by the concerned engineer. As rightly found by courts below in such a situation question is whether respondent being the contractor who is bound by the terms of Ext.B2 agreement, can disobey to execute the work as directed by the concerned engineer. The relevant clause in Ext.B2 agreement or any other clause enables the respondent to avoid the execution of the additional work as directed by the engineer. The contractor has no other alternative but to execute the work, even if it is an additional work directed to be done by the Engineer even if it was not sanctioned by the Panchayat. Therefore respondent cannot be found fault for executing the work, without the sanction of the Panchayat.

10.The question then is in that case when the respondent is bound to execute the work and

executed the work, whether he is entitled to get payment for the work. Clause 13 of Ext.B2 establishes that once the contractor executed the works as directed by the engineer, in accordance with clause 13, he is entitled to get payment for the work at the schedule rates provided in Ext.B2 minus the proportionate difference between the probable amount of contract as per the accepted tender and estimated amount excluding the cost of departmental materials supplied. As found by courts below, when respondent has carried out the work, he is entitled to get payment for the amount at rate provided under Ext.B2. Therefore findings of the courts below that respondent is entitled for payment for the work is perfectly correct. The question whether executive engineer was acting lawfully or as provided under the relevant rules is not a question to be decided, when the entitlement of the respondent for payment for the work executed by him is to be decided. That is a question to be

decided in between the officials of the Department and the Panchayat. If the executive engineer got the work executed without the sanction of the Panchayat, it will not enable the Panchayat to avoid payment for the work executed by the respondent in accordance with Ext.B2 agreement.

11. Then the only question is whether Ext.B4 amount to either a waiver or an estoppel as canvassed by appellant. Ext.B4 is a bill prepared in a printed form. It contains a receipt which reads:-

> "Received Rs.26174/-on account of this work (as a final payment in settlement of all demands)."

Respondent has signed over the revenue stamp in that receipt. The only endorsement made by respondent, apart from the signature over the revenue stamp, is the endorsement that he received the amount by cheque. The fact that it is for the final payment in full settlement of all demands

is part of the printed form. There is nothing in Ext.B4 to indicate that Ext.B4 receipt was issued either with the knowledge that by giving a receipt for Rs.26174/- he is relinquishing the claim for the additional work. Learned Sub Judge and learned District Judge on appreciation of evidence found that correspondence between the respondent and appellant, before and after Ext.B4 establish that Ext.B4 receipt was not executed with the intention of giving up the claim for the additional work carried out by him or by waiving his claim for all other claims,under Ext.B2 agreement. In such circumstance, courts below rightly found that Ext.B4 will not operate as either a waiver or estoppel against the claim for payment of additional work executed by respondent. Therefore I find no reason to interfere with the concurrent findings of courts below. If the grievance of the appellant is that the executive engineer got executed the work in violation of the Kerala Panchayats (Plan and

Estimates) Rules, 1963 without submitting a revised estimate or obtaining sanction from the Panchayat, appellant is at liberty to proceed against the concerned officials for realisation of the amount.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.533 /94

JUDGMENT

22ND NOVEMBER,2007